MOTION FILED

NOV 28 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-19

UNITED STATES OF AMERICA,

Petitioner,

vs.

DOMINGA SANTANA and WILLIAM ALEJANDRO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, INC.

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Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc., and The National District Attorney's Association, Inc., respectfully move this Court for leave to file a brief, *amici curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; Counsel for the respondents have not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. Consent of counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness in dealing with crime.

The National District Attorneys Association (NDAA) is a nonprofit, nonpolitical, tax exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the National District Attorneys Association are, *inter alia,* to improve and to facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims the National District Attorneys Association for many years has utilized an Amicus Curiae Committee to file briefs in cases of national importance in the United States Supreme Court. The NDAA seeks to make known the views of all prosecutors in America and to bring before this Court their position on matters affecting the discharge of the duties of prosecutor.

Amici herein have an abiding interest in the effectiveness of law enforcement in this country. This case involves the highly important question of the permissible extent of police activity when law enforcement officers are confronted with exigent circumstances. Thus both *amici* believe that they have a direct interest in the outcome of this case.

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BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER.

ARGUMENT.

I.

This Court Should Define with Reasonable Certainty When "Exigent Circumstances" Exist Which Will Justify Law Enforcement Officers in Proceeding to Make an Arrest or Search Without a Warrant.

Former Justice Clark, in *Chapman* v. *United States,* 365 U. S. 610 (1961), made one of the most trenchant and accurate comments about the courts *vis-a-vis* the police which has ever been spoken. He stated:

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. 365 U. S. at 622. (Dissenting opinion.)

This assessment is accurate. Law enforcement officers across the country *are* called upon more and more to make value judgments as to proper police action, including questions of search and seizure. In fact, in these days of soaring crime rates[1] the statement by Mr. Justice Clark takes on even greater significance, for as more crimes are being committed the police will of necessity find themselves called upon more often to make decisions involving the search for and seizure of evidence of crime.

Justice Clark was equally accurate in his statement that the policeman ". . . is anxious to obey the rules that circumscribe his conduct . . ." in the field of search and seizure. This is evidenced by the facts of the instant case, and is implicit in the opinion of the trial court below, the United States District Court for the Eastern District of Pennsylvania, which is the only written opinion in this case. There the court held that the evidence against Respondent Santana should be suppressed, *but* the court expressly stated that it did not criticize the actions of the police. (Petition of the United States for Certiorari, Appendix Z, page 5A, see also, page 13 below.)

Finally, Mr. Justice Clark stated, "It is the duty of this Court to lay down those rules with such clarity and understanding that [the policeman] may be able to follow them." 365 U. S. at 622. The importance of this assertion cannot be overstated. Certainly the law enforcement agencies of this country, who must deal with rampant and increasing crime on a day-to-day basis, need and deserve from this Court rulings governing their conduct of sufficient *clarity* that they may know with reasonable certainty

1. The Uniform Crime Reports of the F.B.I. indicate that in 1974 serious crime in the United States increased by 18% over the previous year.

what they can and cannot do. And, as Justice Clark noted, such rules should be promulgated with an *understanding* of the realities of police work.

This Court has responded with admirable clarity and understanding in other areas of the law of search and seizure. For example, in *Terry* v. *Ohio,* 392 U. S. 1 (1968), very clear guidelines were laid down by the Court as to what circumstances would justify a "stop and frisk" of criminal suspects. Perhaps the very clear-cut language in *Terry* is the reason that this Court has found it necessary to review police "stop and frisk" procedures in only one other case in the eight years since *Terry* was decided.[2] We point out that "stop and frisk" as defined in *Terry* gave to law enforcement officers a very wide discretion but this discretion was delineated in such a well-drawn opinion that the police know the limits of their discretion with reasonable certainty, hence the relative dearth of litigation on the matter, at least at the level of the Supreme Court of the United States.

In another area of search and seizure, the construction of affidavits for search warrants, this Court, in *United States* v. *Harris,* 403 U. S. 573 (1971), clarified much of the confusion caused by *Aguilar* v. *Texas,* 378 U. S. 108 (1963), and *Spinelli* v. *United States,* 393 U. S. 410 (1969). Additionally, this Court in *Harris* displayed the understanding of the problems of police work, called for by Mr. Justice Clark, by admonishing lower courts to refrain from utilizing "hypertechnical" standards when judging the sufficiency of affidavits made to establish probable cause for search warrants. (403 U. S. at 579.)

We submit that the instant case provides an ideal vehicle for the Court to utilize the same clarity and understanding so apparent in *Terry* and *Harris, supra,* to make reasonably certain the limits of legitimate police conduct in that most problematical of areas: exigent circumstances as a justification for police action in the absence of a warrant.

2. The case was *Adams* v. *Williams,* 407 U. S. 143 (1972).

As the Government has pointed out, because there was, in this case, no written opinion but merely a *per curiam* affirmation of the trial court's order of suppression by the United States Court of Appeals for the Third Circuit, it is difficult to define the precise rationale of the Court of Appeals in affirming. It is not clear from the opinion of the trial court whether the suppression of evidence resulted from the failure of the police to obtain an *arrest* warrant before going to Mrs. Santana's house in the first place or the failure of the police to obtain a *search* warrant before entering her house. The trial court appears to refer to arrest and search warrants interchangably. (See Appendix A to the Petition for Certiorari of the United States in this case.)

What *is* clear is that the trial court refused to hold that the exigencies of the situation in this case—which the court itself characterized as the "extreme emergency posture" of the case—justified the police action taken without a warrant Thus, this case squarely presents the question of "exigent circumstances" as an exception to the warrant requirement.

We state at the outset that we do not quarrel with the proposition that, where it is possible to do so, the police should obtain a search warrant before taking action. *Katz* v. *United States,* 389 U. S. 347 (1967); *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971). We submit, however, that due to the volatile nature of the job of enforcing the criminal law, the number of unknowns which will inevitably occur in police work, and the necessity for quick action in such work, situations will often arise in which a reasonable man would conclude that the police should take immediate action. These are "exigent circumstances."

The *doctrine* of exigent circumstances had long been recognized in the jurisprudence of search and seizure, *Johnson* v. *United States,* 333 U. S. 10 (1948); *McDonald* v. *United States,* 335 U. S. 451 (1948), *Warden* v. *Hayden,* 387 U. S. 294 (1967). However, as was pointed out by the United States

Court of Appeals for the Third Circuit in *U. S.* v. *Rubin*, 474 F. 2d 262 (1973), the courts have not in fact delineated exigent circumstances to any great extent.

Courts have spoken to the question of exigent circumstances only on a case by case basis and this has led to a great deal of confusion, particularly to police officers who must make their decision whether or not to act, on the street, and usually in a very short period of time. To illustrate, the Court of Appeals which affirmed, without opinion, the suppression of evidence in the instant case had, in 1973, found that exigent circumstances justified the warrantless search of a garage when a defendant, after his arrest shouted "Call my brother." *U. S.* v. *Rubin*, 474 F. 2d 262 (3rd Cir. 1973). The court in *Rubin* held that the officers could search the garage because they could reasonably conclude that the contraband was in danger of being destroyed even though they did not then *know* it was then being destroyed.

It would appear that the instant case and *Rubin, supra,* both from the same Circuit, are in direct conflict with each other and other courts have been equally at variance; cf. *United States* v. *Curran*, 498 F. 2d 30 (9th Cir. 1974), *United States* v. *Samuels*, 374 F. Supp. 684 (E. D. Pa. 1974); *Delaware* v. *Reader*, 328 A. 2d 146 (Superior Ct. Del. 1974) claim of exigent circumstances upheld; *Lugar* v. *Commonwealth*, 202 S. E. 2d 894 (Va. 1974); *United States* v. *Bradshaw*, 490 F. 2d 1097 (4th Cir. 1974), cert. den. 419 U. S. 895 (1974), *United States* v. *Griffin*, 502 F. 2d 959 (6th Cir. 1974), cert. den. 419 U. S. 1050 (1974) claim of exigent circumstances to justify warrantless search rejected.

We submit that this Court should, in the context of the instant case, define when exigent circumstances will justify a warrantless arrest or search, with the "clarity and understanding" called for by Mr. Justice Clark in his dissent in *Chapman, supra.* Since this case raises principally the issue of exigent circumstances in the context of threatened destruction of contraband or threatened disposal of evidence, we will confine the balance of our argument to this issue.

We respectfully suggest that the resolution of the issues in this case should be based upon the "rule of reason" approach taken by this Court in *Terry* v. *Ohio, supra* and *United States* v. *Harris, supra.* Basically we ask for no more than a holding that if a police officer *subjectively* believes that there is a likelihood that contraband or evidence will be disposed of if he does not take immediate action *and* if, by an *objective* standard (*i.e.* the reviewing court), his belief of potential destruction is reasonable, then the requisite exigent circumstances should be found to exist and a warrantless search should be sustained.

Of course, the officer must first have to have probable cause to believe that the contraband is present, as was clearly the situation in the instant case. Our suggested rule for establishing the existence of exigent circumstances does not lower the standard of probable cause to arrest or search. It is directed solely at the question: *assuming* probable cause exists, when will exigent circumstances justify a warrantless arrest or search.

We believe that the standard which we suggest would be fair to both the officer and the accused. It would give a certain sanction to the officer's subjective belief that contraband or evidence might be disposed of unless he took immediate action, a belief which is very important because the officer is the man on the scene best situated to describe why he felt the exigency existed—a situation which was rejected, albeit reluctantly, by the trial court in the instant case.

Our suggested analysis does not, however, leave the entire determination of the situation to the officer; for, in addition, his subjective belief of threatened destruction must be tested by the objective criterion of reasonableness: was his belief a reasonable one in the circumstances of the case? Thus, the court, hearing the motion to suppress, is the final arbiter of the question, but in making its decision the court would be constrained to take into consideration the belief of the officer or officers involved, measured against a standard of reasonableness.

There is certainly precedent for the two pronged test of the existence of exigent circumstances, which we suggest, to be found in analogous areas of the law. We believe that the holding in *Terry* v. *Ohio, supra,* is, by analogy, directly on point. Mr. Chief Justice Warren, writing for the majority in *Terry* dealt with the subjective state of mind of police officers involved in "stop and frisk" situations. Stating that there should be a narrowly-drawn authority on the part of the police to search for weapons, he continued:

> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. 392 U. S. at 27. (Citations omitted.)

Both standards which we suggest, subjective and objective, are clearly set out by Chief Justice Warren. Emphasis is laid on the subjective specific inferences made by the officer ". . . from the facts in light of his experience." *But the inferences must be reasonable.* Likewise, the Chief Justice stated that, in the stop and frisk situation, the officer need not be "absolutely certain" that the individual was armed. Reasonable belief is the test, as it should be, in the exigent circumstances question. The officer in the latter instance should not have to be absolutely certain that evidence or contraband *will* be destroyed; he should need only to be able to articulate specific facts as to why he felt it might be disposed of and then to have these facts tested against an objective standard of reasonableness.[3]

3. In addition to the *Terry* analysis this is also the rationale being taken by the United States Courts of Appeal in cases involving civil rights actions against police officers after *Bivens* v. *Six Unknown Named Narcotic Agents,* 403 U. S. 388 (1971). In such cases "good faith" is a defense to the officer if he can prove that the arrest or search was made (1) in the good faith belief that probable cause for the arrest or search existed, and (2) by an objective standard, this good faith belief was reasonable. *Bivens* v. *Six Unknown Named Narcotic Agents,* 456 F. 2d 1339 (2d Cir., 1972); *Rodriguez* v. *Jones,* 473 F. 2d 599 (5th Cir., 1973), *cert. den.* 412 U. S. 953 (1973); *Hill* v. *Rowland,* 474 F. 2d 1374 (4th Cir., 1973); *Street* v. *Surdyka,* 492 F. 2d 368 (4th Cir., 1974); *Hoitt* v. *Vitek,* 497 F. 2d 598 (1st Cir., 1974); *Tristis* v. *Backer,* 501 F. 2d 1021 (7th Cir., 1974); *Brubaker* v. *King,* 505 F. 2d 534 (7th Cir., 1974); *Boscarino* v. *Nelson,* 518 F. 2d 879 (7th Cir., 1975).

The two-pronged test of the existence of exigent circumstances can be illustrated by the facts of the instant case. In that situation the subjective state of mind of the Philadelphia police officers can be summarized:

1. They had just made an undercover "buy" of narcotics from McCafferty who advised the officers that she was going to Mrs. Santana to obtain the narcotics for sale to the undercover officer, and who told the police after she had returned with the narcotics and had been arrested, that Mrs. Santana had the marked money with which McCafferty bought the narcotics which she in turn had sold to the officer.
2. The arrest of McCafferty had been made on the street about 1½ blocks from Mrs. Santana's residence.
3. The officers involved in the case had probable cause to believe that Mrs. Santana was in possession of narcotics for sale and that she was then in possession of the marked "buy money."
4. Mrs. Santana and Alejeandro could have been apprised of the arrest of McCafferty on the street and could have then disposed of the contraband and evidence involved.
5. Mrs. Santana was then and there engaged in the commission of a felony of a continuous nature. The police, from the record, had no way of knowing whether or not Mrs. Santana might sell all of the narcotics in her possession, get rid of all of the evi-

> dentiary buy money in her possession, in the process of making "change" in sales to others,[4] or get rid of both, if apprised of McCafferty's arrest, before a warrant could be obtained.

These factors, we submit, could well have been those which formed the subjective state of mind of the police surveillance team when they left the scene of the arrest of McCafferty, proceeded directly to Mrs. Santana's house, observed her in public view in front of her house with a paper bag in her hands, and then after identifying themselves and observing her flight into the house, proceeded into the vestibule, arrested her and seized the heroin and money from her person.

Objectively viewed, could this state of mind of the police have been unreasonable? If we analogize to the statements of Chief Justice Warren in *Terry* v. *Ohio*, quoted above at p. 10 of this brief, we submit that it would *not* be unreasonable in the circumstances for the police to believe that the contraband and evidence, which they had probable cause to believe was in the possession of Mrs. Santana, might have been disposed of in the time it would have taken them to obtain either an arrest warrant or search warrant.

In *Terry* it was held that the officer approaching a suspect did not have to be "absolutely certain" that that suspect was armed in order to initiate a "stop and frisk." The criterion in *Terry* was, rather, "specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience." 392 U. S. at 27. By analogy, the Philadelphia police officers should not have been required to be "absolutely certain" that the evidence and contraband in the possession of Mrs. Santana would be disposed of, only that they could reasonably infer, based upon their experience, that it might have

4. The fact that when the police arrested Mrs. Santana she had only $70.00 of the $110.00 "buy money" given her by McCafferty indicates that this could have been a well-founded apprehension on the part of the police.

been disposed of, thus creating the requisite exigent circumstances which would justify their proceeding without a warrant.

The trial court conceded, in its opinion, the very close nature of the instant case, stating:

> This court believes it is a very close case and the court understands also that *under the extreme emergency posture of a case like this where many unknown events are occurring, police officers oftentimes have difficult decisions to make* and it is much easier for a court on reflection to analyze and pick apart or even indeed criticize, which this court is not doing, the action of the police in this case. (Petition for Certiorari of the United States, Appendix A at page 5.) (Emphasis supplied.)

Nevertheless, the court suppressed the evidence seized from Mrs. Santana based upon what it characterized as ". . . the restricted requirements having to do with warrantless entrance into residences . . ." (Petition for Certiorari of the United States Appendix A, at p. 5.) The lower court evidenced a realistic understanding of the problems faced by police officers on the street, yet it felt constrained to rule against the admissibility of the evidence. This is precisely the state of confusion which exists in the area of exigent circumstances today, an area of confusion which this Court can and should resolve, and which it can and should resolve based upon the rule of reason and common sense principles which we have discussed herein.

CONCLUSION.

In the circumstances of the instant case, this Court should find that exigent circumstances existed which justified the warrantless arrest and search of Respondent, Mrs. Santana. Further, this Court should clarify the law of exigent circumstances for the guidance of law enforcement in future cases. We respectfully suggest that such a definition should be based upon the subjective determination of police officers, on the scene, that an exigency did in fact exist due to the threat of destruction

or disposal of evidence and/or contraband. However, as in *Terry* v. *Ohio*, 392 U. S. 1 (1968), there should be an objective determination by the trial court that the subjective determination made by the officers was in fact reasonable.

We urge this Court so to hold and to reverse the decision of the trial court and the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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